80-1827

NO.

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ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

R. G. Russ, Jr., et ux, Helen Russ

Petitioners,

vs.

State of Texas, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES of PHILIP R. RUSS
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ATTORNEY FOR PETITIONERS
R. G. Russ, Jr., et ux,
Helen Russ

TABLE OF CONTENTS

Page

Questions Presented 1

Opinions Below 2

Jurisdiction 2

Statutes Involved 2

Statements of the Case 3

Reasons For Granting The Writ 6

A. The Decision Below Is In Direct Conflict With A Controlling Decision Of This Court 7

B. There Is A Conflict Among The Circuits On The Issue Of Whether The Environmental Impact Statement For I-27 Is Adequate In That It Covers Only One Segment Of The Highway And Does Not Treat The Elimination Of Farmland From Production 9

Conclusion 13

Certificate 14

APPENDIX A

Opinion of Fifth Circuit A-1

Judgment of Fifth Circuit A-6

APPENDIX B

Findings of Fact and Conclusions of Law of District Court B-1

APPENDIX C

District Court Judgment C-1

APPENDIX D

ORDER Denying Petition for Rehearing D-1

TABLE OF AUTHORITIES

CASES

Page

Arlington Coalition on Transportation, et al v. *Volpe,* 458 F. 2d. 1323 (4th Cir, 1972) .....

Calvert Cliff's Coordinating Committee v. *Atomic Energy Commission,* 449 F. 2d. 1109, (D. C. Circuit, 1971) .....

Environmental Defense Fund v. *Corps of Engineers of the U.S. Army,* 325 F. Supp. 728, 325 F. Supp. 749, (E. D. Ark., 1970) .....

Robinson, et al v. *Knebel,* 550 F. 2d 422 (8th Cir., 1977) .....

Scherr v. *Volpe,* 336 F. Supp. 882, (W. D. Wisc., 1972) .....

Sierra Club v. *Froehlke (Kickapoo River),* 345 F. Supp. 440 (W. D. Wisc., 1972) .....

Stryker's Bay Neighborhood Council v. *Karlen,* _____ U.S. _____, 62 L. Ed 2d 433 (1980).....

Swain v. *Brinegar,* 517 F. 2d 766 and 542 F. 2d 363 (en banc) (7th Cir., 1976).....

The Upper Pecos Association v. *Stans,* 328 F. Supp. 332, (D. N. M., 1971).....

Vermont Yankee Nuclear Power Corp. v. *NRDC,* 435 U. S. 519 (1978).....

STATUTES

5 U. S. C. §701-706
28 U. S. C. §1254(1)
28 U. S. C. §2201-2202
28 U. S. C. §1361
28 U. S. C. §1331(A)
42 U. S. C. §4332

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NO.....

R. G. Russ, Jr., et ux, Helen Russ,

Petitioners,

vs.

State of Texas, by and through the State Department of Highways and Public Transportation, et al[1]

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, R. G. Russ, Jr., et ux, Helen Russ (Russ), respectfully request that a writ of certiorari issue

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[1]Other parties United States, by and through Environmental Protection Agency, Department of Transportation, Federal Highway Administration and their agents George C. Wall, Jr., Morris Monroe, Clinton B. Spitts, Dave Williamson, A. L. Lewis, and B. L. DeBerry.

[2]435 U.S. 519 (1978)

to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 19, 1980 and Order overruling Petition for Rehearing entered February 3, 1981.

QUESTIONS PRESENTED

Does the judgment of the court below conflict with the decisions of this Court as set forth in *Vermont Yankee Nuclear Power Corp. v. NRDC*[2], where on the evidence of record the court below affirmed the judgment of the trial Court finding that:

1. The trial court applied the correct standard of review regarding the Environmental Impact Statement (EIS) concerning its scope and adequacy;

2. The final EIS which was prepared and filed relative to the project subject of this litigation in failing to discuss emissions, the ogallala aquifer, the long range effects of the irretrievable loss of farmland and the do nothing alternative, is adequate;

3. That the "rule of reason" is the applicable standard of review by an appellate Court with regard to the National Environmental Policies Act of 1969 (NEPA).

Whether the decision of the Fifth Circuit is in conflict with the decision of the Seventh Court of Appeals in its

decision of the case of *Swain v. Brinegar,* 517 F.2d 766 and 542 F.2d 363 (en banc) (7th Cir., 1976).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported but is printed in the Appendix at page A-1. The ruling of the United States District Court for the Northern District of Texas, Lubbock Division, is not reported but is printed in the Appendix at page B-1.

JURISDICTION

The Fifth Circuit's judgment was entered on December 19, 1980, and the Petitioners' timely petition for rehearing was denied on February 3, 1981, printed in the Appendix at page D-1. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The relevant provisions of the National Environmental Policies Act of 1969 (NEPA), as amended, (42 U.S. C. §4332), provides:

"The Congress authorizes and Directs that, to the

fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

(A) ***

(B) identify and develop methods and procedures, ***, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for . . . and other major Federal actions significantly affecting the quality of human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action;

(ii) ***

(iii) ***

(iv) ***

(v) any irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(D) ***

(E) ***

(F) recognize the worldwide and long-range character of environmental problems, . . .;

(G) ***

(H) ***

(I) ***

STATEMENT OF THE CASE

This is an environmental action in which the peti-

tioners (Russ) landowners who reside on their farm in Hale County, Texas, along the proposed route for Interstate Highway 27 (the project) contended that the State of Texas, Department of Highways and Public Transportation (THD) and the United States Department of Transportation (DT) and the Federal Highway Administration (FHWA) failed to comply with the provisions of NEPA and that the EIS on the project is inadequate. Jurisdiction of the District Court was predicted upon 28 USC §2201-2202, being an action in which the petitioners seek declaration of their rights under NEPA, as well as 28 USC §1361, 28 U.S. C. §1331 (A) and §10 of the Administrative Procedures Act, 5 USC 701-706.

Petitioners filed their Complaint and Jury Demand in the United States District Court, Northern District of Texas, Lubbock Division, on November 28, 1978, at which time thay also filed a Motion for Temporary Injunction to halt the project. The project is a major federal action and will take some 28.805 acres of farmland out of production from petitioner's property and approximately 1500 acres out of agricultural production for the entire project. In constructing the project it will cross a 66-inch underground aquaduct on petitioners' property maintained by the Canadian River Municipal Water

Authority ("CRMWA") which respondents admit is itself a major federal action, though not discussed or analyzed in the EIS.

The project, on petitioners' property and elsewhere, crosses interconnected playa lakes, some of which may be wetlands, which are indigenous to the area. Furthermore, petitioners and other farmers in the area raise cotton and other crops immediately adjacent to the project. Respondents admit that the project will increase the number of vehicular trips on the road in question and thereby increase the emissions of sulphuric acid (H_2SO_4) from catalytic converters on vehicles traversing the project. These increased emissions will adversely affect the grade of cotton produced in the area of the project but has not been studied and analyzed by the EIS.

Respondents do not dispute that they have failed to conduct any studies to determine the "long range effects of taking agricultural farmland out of production as opposed to leaving same in production as an alternative to the project." Respondents likewise do not dispute that the "do nothing" alternative to the project has not been discussed in the EIS, other than being mentioned in a perfunctory manner.

The District Court in this case, following all parties

resting on the hearing for preliminary injunction, made Findings of Fact and Conclusions of Law and entered a take nothing Judgment on the merits on January 15, 1979. (App. B-1, C-1)

REASONS FOR GRANTING THE WRIT

The decision below raises important questions relating to the proper interpretation and application of requirements and principles established under federal environmental law descriptive of the content and adequacy of content of an environmental impact statement and the standard of review the courts are required to follow in reviewing the adequacy of an EIS.

The decision below conflicts with the decisions of this Court, and with decisions in the Fifth and other Circuit Courts of Appeal which establish the standards to be used in determining whether an EIS is adequate, the standard of review by the appellate courts in reviewing the trial courts decision, i.e., whether NEPA shall be complied with "to the fullest extend possible" or be governed by the "rule of reason."

The decision below conflicts with the decisions of this Court, and with those of the Fifth, Seventh and other Circuits stating that NEPA is an environmental "full disclosure law" which must list "all known possible

environmental consequences" and further holding that the "do nothing alternative" must be discussed. The decision conflicts with the decisions as to whether the environmental consequences must be discussed and analyzed or merely mentioned. Other circuits have stated that an EIS cannot be fragmented or segmented as it is in this case.

Review by the Court is required also to assure the maintenance of uniformity in decisions of the Courts of Appeals in the adjudication of environmental disputes.

A. The Decision Below Is In Direct Conflict With A Controlling Decision of This Court.

The Fifth Circuit's decision herein allowing the construction of the project when the EIS is (1) segmented or fragmented, (2) does not analyze or evaluate (a) the irretrievable loss of agriculturally productive lands eliminated from production of food and fiber for construction of a highway, (b) the effect of emissions on crops, (c) the effect of changes in grading lands and alteration of watersheds on the ogallala aquifer and playa lakes and (d) the do nothing alternative either in whole or in part conflicts with *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) and *Stryker's Bay Neighborhood Council v. Karlen*, _____ U.S. _____. 62 L.Ed. 2d 433 (1980).

In *Vermont Yankee* and followed in *Stryker's Bay* the Court stated that the Court's role in a review of an agency decision relative to the environment was to "insure that the agency considered the environmental consequences." At trial herein respondents did not nor have they ever disputed that there is no discussion of the "long range effects of the irretrievable loss of agriculturally productive lands being eliminated from production of food and fiber (some 1500 acres) for construction of a highway", (2) the "do nothing alternative", (3) the effect that construction of the project will have on (a) crops growing adjacent to the project and (b) the effect of alterations in the watershed and grading of lands on playa lakes and the Ogallala aquifer. NEPA provides procedural duties (e.g., preparation of the EIS) must be complied with to "the fullest extent possible." Recognizing that this standard does not call for perfection and assuming the "rule of reason" applicable, does this mean that an EIS is adequate by simply stating that the "do nothing alternative presupposes abandoning the project" or that "no studies were conducted because any effects on the environment are self-evident or if the EIS is fragmented simply ignore same? The Fifth Circuit's decision in the case at bar clearly sanctins such a result. In spite of the dispositive facts that

the deficiencies in the EIS complained of by petitioners relative to the project are not in dispute, the trial and appellate courts held the petitioner's did not meet their burden in proving these deficiencies. If the failure to treat these issues in the EIS are admitted then they must be conclusively proved. The result is contradictory to the policy enunciated in *Vermont Yankee* and *Stryker's Bay.*

B. There Is A Conflict Among The Circuits On The Issue of Whether The Environmental Impact Statement For I-27 Is Adequate In That It Covers Only One Segment Of the Highway And Does Not Treat The Elimination Of Farmland From Production.

Calvert's Coordinating Committee v. Atomic Energy Commission, 449 F. 2d 1109, (D.C. Circuit, 1971) and *Vermont Yankee,* supra, which should have resolved once and for all the issue of whether an impact statement must be analytical, detailed, non-fragmatized or non-segmented and consider "to the fullest extent possible" all environmental considerations, have not had that effect. Instead, the lower courts have failed to apply *Calvert Cliff's* and *Vermont Yankee* uniformly, and a conflict among the circuits on an important issue of environmental law has developed.

The Fifth Circuit in its decision in this case is in con-

flict with the Seventh Circuit. *Swain v. Brinegar,* 517 F.2d 766, 542 F. 2d 363 (en banc) (7th Cir., 1976). The fact pattern of *Swain* is virtually identical to that of the instant cause but the results are contrary to each other. In *Swain* the Seventh Circuit stated it was improper to segment the project in the EIS and preparation of an EIS for the entire 42 mile project was required. The Seventh Circuit in *Swain* noted with approval that the EIS considered all the relevant environmental consequences of the proposed highway, including the taking of farmland, the increase in noise and air pollution and the harm caused by any changes in the land grading. These considerations are notably absent (with the exception of noise consideration) in the case at bar.

Calvert Cliff's states that compliance with NEPA must be more than pro forma ritual and that the Congressional command that the act be complied with to the "fullest extent possible" does not make NEPA's procedural requirements "discretionary."

The Fourth Circuit in *Arlington Coalition on Transportation, et al v. Volpe,* 458 F. 2d 1323 (4th Cir., 1972) enjoined further acquisition of right of way and construction of Arlington I-66 until the appellees ****, (2) ascertained there was "no feasible and prudent alternative" to the use of Bon Air Park ****.

The Eighth Circuit in *Robinson, et al v. Knebel,* 550 F. 2d 422 (8th Cir., 1977) held that a discussion of alternatives to the project in the EIS was sufficient if it presents sufficient information for a reasoned choice of alternatives. The decision below in the instant case conflicts with *Robinson.*

The Fifth Circuit's decision is also in conflict with several district court decisions. *Environmental Defense Fund v. Corps of Engineers of the U.S. Army,* 325 F. Supp. 728, 325 F. Supp. 749, (E.D. Ark., 1970); *Scherr v. Volpe,* 336 F. Supp. 882, (W.D. Wisc., 1971); *The Upper Pecos Association v. Stans,* 328 F. Supp. 332, (D.N.M., 1971); *Sierra Club v. Froehlke (Kickapoo River),* 345 F. Supp. 440, (W.D. Wisc., 1972).

The court below ruled that petitioners were required to establish by a preponderance of the evidence, rather than by a prima facie showing of deficiencies, that the EIS was inadequate. On the face of the EIS the "do nothing alternative" and other items are not discussed or analyzed but merely mentioned, if at all. The respondents contend that many of the environmental consequences are self-evident and do not therefore need discussion. Surely, if the cases mean what they say and no discussion of the various environmental consequences are had, including an analysis of those consequences, the inadequacy of the EIS is then conclusively established.

The Court below is shown to have refused to heed (although so urged by Russ) the principles established by the decision in *Calvert Cliff's, Swain* and *Vermont Yankee* to discuss "to the fullest extent possible" all environmental consequences. The evidence which is undisputed established the EIS inadequate on its face. In this day of ever increasing shortages, growing domestic and world population and increasing demands on agricultural production in the face of industrial expansion, highway construction and growing cities and towns it is of paramount importance to this country and the world it feeds that the long range effect of the irretrievable loss of farmland from production of food and fiber must be considered, analyzed and weighed against the utility, desirability and need, if any, of such a project as the one in question.

Finally, it is submitted that the decision below, if allowed to stand, will impair substantial uniformity in the decisions of the Circuit Courts, and cause an erosion of fundamental principles inherent in federal environmental law policy. It is respectfully submitted that the failure of the court below to apply applicable principles of law established by the decisions of this Court requires that the Court grant certiorari. The lower federal courts are getting the environmental law in this key area into a

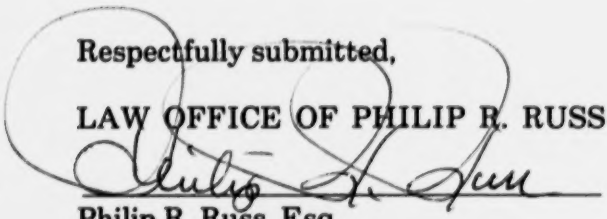
tangle of considerable proportions. Only a definitive decision by this Court will clarify the situation and permit the environmental laws to be enforced uniformly and fairly in all circuits without unduly burdening the judiciary. The issues in this case merit review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiori to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

LAW OFFICE OF PHILIP R. RUSS



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Amarillo, Texas 79105
Attorney for Petitioners
R. G. Russ, Jr. and Helen Russ

CERTIFICATE

The undersigned hereby certifies that copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have this day been served upon counsel for the Respondents by depositing same in the United States mail, with sufficient postage affixed, addressed as follows:

Stephen Greenberg, Esq.
Assistant Attorney General
State of Texas
P. O. Box 5075
Austin, Texas 78763

Judith Shepherd, Esq.
Assistant U.S. Attorney
16th Floor, U.S. Courthouse
1100 Commerce St.
Dallas, Texas 75249

Attorney General of the United States
Washington, D.C.

DATED AND SIGNED this the 30th day of April, 1981, at Amarillo, Texas.

Philip R. Russ, Esq.

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 79-1539

R. G. Russ, Jr., et ux, Helen Russ, Individuals,
Plaintiffs-Appellants,

versus

State of Texas, by and through the State Department of Highways and Public Transportation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(DECEMBER 19, 1980)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

This is an appeal from a final judgment adverse to the plaintiff's-appellant's claims seeking mandamus and injunctive relief against the construction by the State of Texas, the United States and their agencies and agents of U.S. Interstate Highway 27 from Hale Center, Texas, to the Swisher-Randall County line in Texas. After a hearing on the preliminary injunction, the district court decided the case on the merits and found that the defen-

dants-appellees had complied with the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, *et seq.* We affirm.

Appellants, R. G. Russ, Jr. and Helen Russ, are farmer landowners along a portion of the proposed route of Interstate Highway 27 (IH27). The proposed route will upgrade the existing U.S. Highway 87 which currently bisects their farm property. The entire project is 52 miles long of which approximately 19 miles is on new location. Approximately 1,500 acres of farmland will be lost to this project of which 28 acres will be taken from appellants.

The Texas Highway Department is responsible for the project's planning and construction. The Department prepared a draft environmental impact statement (EIS) for the project. This draft EIS was cleared by the Federal Highway Administration and made available to the public and the Council on Environmental Quality on May 17, 1972. The draft EIS was also circulated to 16 concerned agencies and local governments. On May 3 and 4, 1973, public corridor hearings were held in Plainview and Tulia, Texas, respectively. Social, economic and environmental impacts of the project were presented and discussed. Various written comments were made by agencies suggesting improvements to be made in the EIS. All of these comments were considered in preparation of the final EIS. The final EIS was approved by the Federal Highway Administration on August 21, 1973. It was forwarded to the Council on Environmental Quality and was published in the Federal Register on October 5, 1973.

On October 1, 1974 and May 6, 1975, public design hearings were held in Plainview and Tulia, respectively. Again, social, economic and environmental impacts of the project were open to discussion. Four design

changes in the project were made in response to public comments. The final EIS was reevaluated by the Federal Highway Administration and it determined that the changes in design were not so substantial as to cause a changed environmental effect of significance to the quality of the human environment.

Appellants first complain on appeal that the district court erred in consolidating the hearing on preliminary injunction with the trial on the merits without notice. In addition, they complain that the consolidation denied them a right to a jury trial. Taking the latter complaint first, we find no authority for appellants' claim to a jury trial. Neither NEPA nor the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* create a right to a jury trial. Furthermore, the rights and remedies sought to be enforced by appellants are wholly equitable and as such are to be tried to the court. We therefore hold that appellants had no right to a jury trial.

Next we must determine whether the district court abused his discretion in the consolidation. Rule 65(a)(2) of the Federal Rules of Civil Procedure give the trial judge discretion to combine a hearing on a motion for preliminary injunction with the trial on the merits. The combining may be done before or after the commencement of the hearing so long as the parties are not deprived of a right to jury trial. *See Bowles v. Bennett,* No. 78-3524, Slip Opinion 845 (5th Cir. 1980). Here, however, appellants had no deprivation of a jury trial for they had no such right. Furthermore, appellants never objected, by written motion, to apellee's joint motion to consolidate nor did they, by written motion, ask the Court to reconsider its order granting the motion of consolidation prior to or after the Court's entry of Judgment. Nor have appellants shown how they were prevented from fully developing their case or otherwise pre-

judiced by the consolidation. We hold that the district court did not abuse its discretion in the consolidation.

We now turn to appellants' main concern on this appeal of whether or not the district court applied the proper standard of review of the EIS and whether or not the EIS was adequate. Regarding the adequacy of the EIS, appellants' complaints are summarized as follows: The EIS does not meaningfully discuss or evaluate the permanent loss of agricultural land nor does it reasonably consider available alternatives including the "do nothing" alternative. The EIS is illogically fragmented by covering a segment of the IH 27 project starting in the middle of nowhere and continuing to a point in the middle of nowhere with no logical beginning or end. The EIS analysis is inadequate or ignores the effects of the project upon water sources such as the Callahan Draw and the Ogallala Aquifer. Lastly, the EIS ignores the effect of increased automobile emissions and related detrimental effects on agriculture caused by increased traffic.

In presenting their case to the district court, the appellants took the position that the defendants-appelees had the burden of establishing by a preponderance of the evidence that the EIS was adequate. This position was legally incorrect. The appellants were required to establish by a preponderance of the evidence, rather than a *prima facie* showing of deficiencies, that the EIS was inadequate. *Sierra Club V. Morton,* 510 F. 2d 813 (5th Cir. 1975). The appellants also had the burden of proving that any omitted environmental impacts were the probable effect of the project and that the adverse environmental effect would be significant. *Environmental Defense Fund, Inc. v. Corps of Engineers of the U.S. Army,* 492 F.2d 1123 (5th Cir. 1974). Since appellants failed to convince the district court

that the EIS was inadequate, their burden on appeal was to convince us that the district court was clearly erroneous. *Sierra Club V. Morton, Supra.*

The district court made extensive findings of fact concerning the procedures followed by the Texas Highway Department in obeying the requirements of NEPA. The court also found that appellants had failed to prove that the EIS did not consider and treat significant adverse effects of the project upon the environment and otherwise found and concluded that the EIS was adequate. Having reviewed the record, we find that the district court's findings have ample support. Neither the briefs or oral argument convince us that the district court is clearly erroneous. Therefore, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1539

D. C. DOCKET NO. CA-5-78-138

R. G. Russ, Jr., et ux, Helen Russ, Individuals,
Plaintiffs-Appellants,

versus

State of Texas, by and through the State Department of Highways and Public Transportation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

December 19, 1980

ISSUED, AS MANDATE: February 26, 1981.

A true copy
Test: Gilbert F. Ganacheau
Clerk, U.S. Court of Appeals, Fifth Circuit
by /s/ Linda Johnson
Deputy, February 26, 1981
New Orleans, Louisiana

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

R. G. RUSS, JR.,	§	
ET AL,	§	
Plaintiffs	§	
	§	CIVIL ACTION
V.	§	NO. CA-5-78-138-D
	§	
THE STATE OF	§	
TEXAS,	§	
ET AL,	§	
Defendants	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs R. G. Russ, Jr. (Russ) and Helen Russ (Mrs. Russ) own land in Hale County, Texas along the proposed route of Interstate Highway 27 (IH 27). The proposed route will require the taking of 28.805 acres of plaintiffs' property as right-of-way.

2. Defendant George C. Wall, Jr. (Wall) is District Engineer for defendant Texas Department of Highway and Public Transportation (Texas Highway Department) responsible for planning and construction of IH 27 from 0.20 miles northeast of Hale Center north to the Swisher-Randall County line (the project).

3. Defendant R. L. Lewis (Lewis) is the Chief Engineer for Highway Design for the Texas Highway Department. Lewis and Wall were responsible for the

drafting of the environmental impact statement (EIS) for the project.

4. Defendant B. L. DeBerry is Engineer-Director and Chief Administrative Officer of the Texas Highway Department.

5. The project as planned is essentially an upgrading of U.S. 87, which is presently a four-lane highway with a median strip and numerous at-grade crossings and which bisects Plaintiffs' property. The new facility will be a four-lane, controlled access highway with frontage roads, paved shoulders, and improved drainage features. The project length is about 52 miles of which approximately 19 miles is on new location.

6. The draft Environmental Impact Statement (EIS) for the project was cleared by the Federal Highway Administration (FHWA) and made available to the public and the Council on Environmental Quality on May 17, 1972.

7. The draft EIS for the project was circulated to 16 agencies and local governments including the Department of Transportation, Department of Housing and Urban Development, the Department of Health, Education and Welfare, the Department of Agriculture, the Army Corps of Engineers, the Department of Interior, and the Environmental Protection Agency (EPA).

8. After proper notice, corridor public hearings on the project were held in Plainview, Texas, on May 3, 1973, and in Tulia, Texas, on May 4, 1973. Social, economic and environmental impacts of the project and several alternatives were presented and open to discussion.

9. A copy of the draft EIS was made available for public inspection at the corridor hearings.

10. Russ was present at the Tulia corridor hearing and he made no comment on the record.

11. Two representatives of the Texas Highway

Dpeartment responsible for the project, including Wall, participated in the corridor hearings.

12. An announcement was made at the Tulia hearing that:

> "Written statements are welcome and those received within 10 days of this hearing will be accepted and will become a part of this hearing."

Plaintiffs did not submit any written comments or responses to this announcement.

13. Comments on the draft EIS were made by 14 of the 16 agencies to which it was circulated. These comments and comments made at the hearing and by letters after the hearing by private citizens were considered and disposed of in the final EIS.

14. The final EIS was approved and adopted by the Regional Office of the FHWA on August 21, 1973.

15. The EPA reviewed the final EIS and determined that it was not unsatisfactory from the standpoint of public health or welfare or environmental quality.

16. The FHWA forwarded the final EIS to the Council of Environmental Quality (CEQ) and it was published on October 5, 1973, in the Federal Register.

17. After proper notice design hearings were held in Plainview, Texas, on October 1, 1974, and in Tulia, Texas, on May 6, 1975. The Plainview hearing was attended by both Russ and Mrs. Russ. It was announced at these hearings that an EIS was on file in the District Office in Lubbock and in the Resident Engineer's Office in Plainview for inspection and copying.

18. A presentation was made at both design hearings of the social, economic, environmental impacts of the project and these impacts were open to discussion.

19. Neither Russ or Mrs. Russ made comments on the record at the Plainview hearing.

20. The design features of the project were discussed

at the design hearings. The proposed interchange of the project with F.M. 2337 was described at the Plainview hearing.

21. Those in attendance at the Plainview hearing were informed that they could submit written statements within 10 days of the hearing. Plaintiffs did not submit any written statement.

22. Two representatives of the Texas Highway Department responsible for the project, including Wall, were present and participated in the design hearings. A division engineer for the FHWA was present at the Tulia hearing.

23. Four design changes were made in response to comments by the public at the design hearings.

24. The final EIS was reevaluated by the FHWA and it determined that these changes in design were not so "substantial" as to introduce a new or changed environmental effect of significance to the quality of the human environment. There has been no showing that the design changes were "substantial" in that a new or changed environmental effect of significance to the human environment would be introduced by such changes.

25. Detailed design for the construction contract for the project has not been completed. The first construction contract for the project is scheduled to be let in February, 1980.

26. Water drainage studies for the design of the project adjacent to plaintiffs' property are ongoing. The culverts for this highway section will be designed to pass a 50-year floor on the main lanes. The design of the culverts of the frontage roads has not been finalized.

27. Callahan Draw is a shallow depression located between two small lakes on plaintiff's property. Callahan Draw is usually dry, but runs water in times of heavy rain. In these respects it is similar to other draws crossed by the project.

28. In times of heavy rainfall water accumulates on the plaintiffs' property near U.S. 87. Since 1960 plaintiffs' property has been flooded by rain water three times. The culverts under U.S. 87 at this location are inadequate to pass a 50-year flood.

29. Callahan Draw is not mentioned in the final EIS. The final EIS does state that the project crosses five other similar draws and names them. It further states these draws are natural drainage draws and carry water only from heavy rainfall over the area.

30. There has been no showing that at the time of the preparation of the EIS the crossing of Callahan Draw by the project would have any significant adverse effect upon the environment.

31. The Canadian River Aqueduct (the Aqueduct) is a 66" water pipe which passes under plaintiff's property. The project will cause a section of the aqueduct to be crossed at one additional point than is now crossed by present U.S. 87. Highways also cross the Aqueduct at other points. At the time of the preparation of the final EIS, there was no history of any ruptures of the Aqueduct at such crossings.

32. The Aqueduct is owned by the Bureau of Reclamation, United States Department of the Interior, and is operated and maintained by the Canadian River Municipal Water Authority.

33. The final EIS took into consideration the crossing of the Aqueduct by the project and contemplated the use of all necessary precautions to avoid any significant adverse effects upon the environment.

34. On February 18, 1977, an agreement was signed by the Canadian River Municipal Water Authority, the Bureau of Reclamation, and the Texas Highway and Public Transportation Commission, which sets forth measures that would be taken by the signatories to pro-

tect approximately 252 feet of the aqueduct where it will be involved with the construction and operation of the project.

35. There has been no showing that the measures called for in the agreement described above would not adequately protect Aqueduct where it is crossed by the project.

36. The Ogallala Aquifer (the Aquifer) is located beneath plaintiffs' property and the project.

37. The final EIS mentions that the Aquifer is located at depths between 300 and 500 feet and is of good quality, is potable and is used for irrigation and domestic purposes. The EIS also concluded that the quality of the water and the water table would not be affected by the project.

38. There has been no showing that at the time of the preparation of the final EIS the project would have any significant adverse effect upon the Aquifer.

39. The final EIS states that the quality of air would not be affected by the project. In response to a comment that air quality could possibly be affected because of exhaust emissions, the final EIS stated that because of required installation of exhaust emission control devices on new vehicles exhaust emissions would not have a significant impact on air quality.

40. In response to a comment that construction will generate dust and other pollutants and therefore the effects on air quality and preventive measures should be discussed, the final EIS stated that sprinkling measures will keep down dust and other pollutants during the construction phase of the project.

41. There has been no showing that at the time of the preparation of the final EIS either exhaust emissions from future traffic or dust and other pollutants generated by the construction of the project would have any significant adverse effect upon the environment.

42. The final EIS discussed alternative routes and a "do nothing" alternative to the project. The estimated costs, transportation requirements, design and engineering factors and the environmental impact of the project and the alternative routes were discussed.

43. There is no proof that the project will result in an irretrievable loss of agriculture property.

44. There has been no showing that at any time of the preparation of the final EIS the use of herbicides and pesticides in connection with the project would have any significant adverse effect on the environment.

45. There has been no showing that at the time of the preparation of the final EIS the project would have any significant adverse effect on wildlife, scenic beauty, noise level, the weeds, or archeological sites.

CONCLUSIONS OF LAW

1. FHWA Procedure and Policy Memorandum (PPM) 90-1 contains the FHWA procedures implementing 42 U.S.C. §4332 which were applicable to the preparation of the final EIS.

2. Plaintiffs have not proven by a preponderance of the evidence that any defendant failed to comply with any relevant provision of PPM 90-1 in preparing the final EIS.

3. EPA complied with 42 U.S.C. §7609 in reviewing the final EIS.

4. PPM 20-8 contains the FHWA procedures implementing 23 U.S.C. §128 which were applicable to the holding of public hearings on the project.

5. Plaintiffs have not proven by a preponderance of the evidence that any defendant failed to comply with 23 U.S.C. §128 and PPM 20-8 promulgated thereunder in holding public hearings concerning the project.

6. Defendants had no duty to supplement the final EIS pursuant to 23 C.F.R. §771.15 with respect to the four design changes made after the completion of the final EIS.

7. Plaintiffs have not proven, by a preponderance of the evidence, that the final EIS does not consider and treat significant adverse effects of the project upon the environment, alternatives to the project, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity and any irreversible and irretrievable commitments of resources which would be involved in the project.

8. Plaintiffs have not proven by a preponderance of the evidence that the final EIS fails to study, develop, and describe appropriate alternatives to the project.

9. The final EIS adequately treats the environmental effect of the crossing of the Aqueduct by the project. Since, at the time of the preparation of the final EIS, the Texas Highway Department had no reason to believe that the crossing of the Aqueduct posed any special design problems not encountered in constructing the existing highway crossings of the Aqueduct and had no knowledge of ruptures in the Aqueduct caused by existing highway crossings, the final EIS was not required to state further than that all necessary precautions would be utilized during the design phase of the project to avoid rupture of the Aqueduct.

10. The sufficiency of an EIS tested under the "rule of reason." It is unreasonable to require an agency to predict in an EIS significant adverse effects on the environment that may result from faulty design of a facility when there is no proof that the facility poses design problems which distinguish it from similar facilities having no history of causing adverse effects upon

the environment. Further, an agency need not presume the faulty construction of a facility.

11. The court does not have pendant jurisdiction over plaintiffs' claim under the Deceptive Trade Practice Act of Texas, Texas Business and Commerce Code, §§17.01 et. seq., because that claim and plaintiffs' federal claims do not derive from a common nucleus of operative fact.

12. All relief sought by plaintiffs should be denied.

Dated this 2nd day of February, 1979.

/s/ Robert M. Hill

United States District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

R. G. RUSS, JR.,	§	
ET AL,	§	
Plaintiffs	§	
	§	CIVIL ACTION
V.	§	NO. CA-5-78-138-D
	§	
THE STATE OF	§	
TEXAS,	§	
ET AL,	§	
Defendants	§	

JUDGMENT

This action came on for trial before the court, Honorable Robert M. Hill, United States District Judge, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the plaintiff's, R. G. Russ, Jr., and Helen Russ, take nothing, that the action be dismissed on the merits and that the defendants, The State of Texas, by and through the State Department of Highways and Public Transportation, an agency of the State of Texas, and the Environmental Protection Agency, an agency of the United States of America, and the U.S. Department of Transportation and Federal Highway Administration, an agency of the United States of America, George C. Wall, Jr., Morris Monroe, Clinton B. Spotts, Dave Williamson, A. L. Lewis, and B. L. DeBerry, and/or their successors, recover of the plaintiffs their cost of action.

Dated this 2nd day of February, 1979.

/s/ Robert M. Hill

United States District Judge

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 79-1539

R. G. Russ, Jr., et ux, Helen Russ, Individuals,
Plaintiffs-Appellants,

versus

State of Texas, by and through the State Department of Highways and Public Transportation, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(FEBRUARY 3, 1981)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Reynaldo G. Garza

United States Circuit Judge